

Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEYS FOR APPELLANT:

**ZACHARY E. KLUTZ**  
**PATRICK G. MURPHY**  
**MICHAEL H. MICHMERHUIZEN**  
Barrett & McNagny, LLP  
Fort Wayne, Indiana

ATTORNEY FOR APPELLEE:

**JOHN C. BOHDAN**  
Glaser & Ebbs  
Fort Wayne, Indiana

---

**IN THE  
COURT OF APPEALS OF INDIANA**

---

CHRISTY GEHRIG,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-0609-CV-400
	)	
MARY JEFFERSON,	)	
	)	
Appellee-Plaintiff	)	

---

APPEAL FROM THE ALLEN SUPERIOR COURT  
The Honorable Nancy Eschoff Boyer, Judge  
Cause No. 02C01-0410-PL-458

---

**June 7, 2007**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**MATHIAS, Judge**

Christy Gehrig (“Gehrig”) appeals the Allen Superior Court’s denial of her motion for attorney’s fees under the qualified settlement offer statute. Concluding that a defendant may incur attorney’s fees even though a third party pays such fees on the defendant’s behalf, we reverse and remand for proceedings consistent with this opinion.

### **Facts and Procedural History**

On April 4, 2003, Gehrig and Mary Jefferson (“Jefferson”) were involved in an automobile accident in Fort Wayne. On October 1, 2004, Jefferson filed a complaint against Gehrig alleging personal injuries as a result of Gehrig’s negligent operation of her vehicle. State Farm Insurance, Gehrig’s automobile insurance carrier, hired counsel to represent Gehrig. State Farm paid all legal expenses on Gehrig’s behalf.

On January 3, 2006, Gehrig made a qualified settlement offer to Jefferson pursuant to Indiana Code section 34-50-1-4. Gehrig offered Jefferson \$638 for a full and final settlement of all claims and defenses. Appellant’s App. p. 18. On March 16, 2006, counsel for Jefferson refused this offer, stating that Jefferson demanded \$7500 in damages. The rejection letter further warned, “As I think you know, State Farm is not entitled to seek the benefit of the qualified settlement offer, in that your carrier is not a party to this action.” Id. at 19.

On June 27th and 28th, the Allen Superior Court conducted a jury trial. The jury rendered a verdict finding for Jefferson but awarding her no money damages. On July 19, 2006, Gehrig filed a motion for attorney’s fees, costs, and expenses pursuant to the qualified settlement offer statute (“QSO statute”). The trial court conducted a hearing on the motion on September 1, 2006. On the same day, the trial court denied Gehrig’s

motion, concluding that she had “not actually incurred expenses, costs, and attorney’s fees as required by statute.” This appeal ensued. Additional facts will be provided as necessary.

### **Standard of Review**

The interpretation of a statute is a question of law reserved for the courts. Shepherd v. Carlin, 813 N.E.2d 1200, 1203 (Ind. Ct. App. 2004). We will review questions of law under a de novo standard and owe no deference to a trial court’s legal conclusions. Id. The primary goal in statutory construction is to determine, give effect to, and implement the intent of the legislature. Id. The best evidence of legislative intent is the language of the statute itself, and all words must be given their plain and ordinary meaning unless indicated by statute. Id. If the language of a statute is clear and unambiguous, it is not subject to judicial interpretation. Id.

### **Discussion and Decision**

On appeal, Gehrig maintains that a party is not required to personally pay the legal costs for his or her representation in order to be eligible for an award of attorney’s fees under the QSO statute. Jefferson, on the other hand, contends that the word “incurred” in the statute must be narrowly construed to signify that only a party who has personally paid such attorney’s fees may recoup them under the statute.

Indiana’s QSO Statute in part provides:

(a) If:

- (1) a recipient does not accept a qualified settlement offer; and
- (2) the final judgment is less favorable to the recipient than the terms of the qualified settlement offer; the court shall award attorney’s fees, costs, and expenses to the offeror upon the offeror’s motion.

\* \* \*

(c) A motion for an award of attorney's fees, costs, and expenses under this section must be filed not more than thirty (30) days after entry of judgment. The motion must be accompanied by an affidavit of the offeror or the offeror's attorney establishing the amount of the attorney's fees and other costs and expenses *incurred by the offeror* after the date of the qualified settlement offer. The affidavit constitutes prima facie proof of the reasonableness of the amount.

Ind. Code § 34-50-1-6 (1999) (emphasis added).

Our court recently interpreted the language "incurred by the offeror" in Scott v. Irmeger, 859 N.E.2d 1238 (Ind. Ct. App. 2007). In Scott, we determined that a defendant may incur attorney's fees even though a third party pays such fees on his or her behalf, entitling the defendant to recover attorney's fees under the QSO statute. In concluding that "incurred" does not signify "personally paid," we relied on Harco, Inc. of Indianapolis v. Plainfield Interstate Family Dining Associates, 758 N.E.2d 931 (Ind. Ct. App. 2001). Harco involved a defendant's recovery of attorney's fees under Indiana Code section 34-52-1-1 from a plaintiff litigating in bad faith. In that case, our court determined that "the trial court is not constrained to award attorney fees only when those fees have been directly billed to and paid by the party. Rather, the relevant inquiry is whether a party has *incurred* attorney fees." Id. at 944 (emphasis in original).

The issue of whether a party has incurred such fees necessarily turns on the relationship between the party and his or her legal counsel. A party's attorney maintains an ethical obligation to represent that party even though a third party may have agreed to pay the legal fees. See Cincinnati Ins. Co. v. Wills, 717 N.E.2d 151, 161 (Ind. 1999). Likewise, in such a case the represented party affirmatively makes use of the attorney's

services, thereby impliedly promising to pay for reasonable attorney's fees. See Estate of Anderson v. Smith, 161 Ind. App. 480, 484, 316 N.E.2d 592, 594 (Ind. Ct. App. 1974). Defendants incurring such an obligation to pay attorney's fees, even though a third party actually pays them on their behalf, are entitled to recover the reasonable costs and expenses required to defend themselves. Scott, 850 N.E.2d at 1241.

In our analysis in Scott, we noted that "Indiana courts have repeatedly held that a party is not required to personally pay the bills for his representation to be eligible for an award of attorney's fees." Id. at 1242 (quoting Rand v. City of Gary, 834 N.E.2d 721, 722 (Ind. Ct. App. 2005)). For example, in Poullard v. Lauth, 793 N.E.2d 1120, 1124 (Ind. Ct. App. 2003), our court held that a "prevailing defendant" was entitled to recover attorney's fees that were paid by a third party because the "purpose of [the] statutory attorney's fees provision [set forth in Indiana Code section 34-7-7-7] is to place the financial burden of defending against so-called SLAPP<sup>1</sup> actions on the party abusing the judicial system by bringing a SLAPP lawsuit." Likewise, our supreme court held in Beeson v. Christian that it was not an abuse of discretion for the trial court to award defendant appellate attorney's fees, where defendant's attorney testified he would not charge her for his work done on appeal. 594 N.E.2d 441, 443 (Ind. 1992). In explaining its statutory interpretation, our supreme court focused on the policy behind the statute awarding such fees,<sup>2</sup> which was to provide legal counsel where a party could not otherwise afford an attorney. Id.

---

<sup>1</sup> SLAPP is an acronym for "strategic lawsuit against public participation." Poullard, 793 N.E.2d at 1122 n.2.

<sup>2</sup> Indiana Code section 31-1-11.5-6 was repealed in 1997.

Following these cases' analysis, in Scott we concluded that the underlying policy behind the QSO statute would be disserved if the force of the statute could be avoided in situations where a nonparty pays the party's attorney's fees. Scott, 859 N.E.2d at 1241. "[I]n this era of congested dockets, [by enacting the QSO statute] the legislature intended to force litigants, especially litigants with claims that are small, to make rational valuations of their cases, rather than clogging our judicial system with small cases that could and should be settled." Shepherd, 813 N.E.2d at 1204 n.2.

In the case at hand, Jefferson refused to settle for any amount less than \$7500. Yet, the jury awarded Jefferson no damages. Believing that the QSO statute would not apply to her case, Jefferson forced Gehrig to incur more than \$13,000 in attorney's fees in preparation for a jury trial. Appellant's App. p. 23. A primary purpose behind the QSO statute is to provide the offering parties with leverage to encourage the other party to seriously evaluate the merits of his or her case. Scott, 859 N.E.2d at 1241. Accordingly, we conclude that the trial court should have awarded attorney's fees to Gehrig under the QSO statute.

Reversed and remanded for proceedings consistent with this opinion.

KIRSCH, J., concurs.

SHARPNACK, J., dissents with separate opinion.

---

**IN THE  
COURT OF APPEALS OF INDIANA**

---

CHRISTY GEHRIG,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-0609-CV-400
	)	
MARY JEFFERSON,	)	
	)	
Appellee-Plaintiff.	)	

---

**SHARPNACK, Judge, dissenting**

By the happenstance of our case assignment system, this case was assigned to the same panel as Scott v. Irmeger, 859 N.E.2d 1238 (Ind. Ct. App. 2007), reh'g denied. In that case, the trial court awarded attorney fees to the defendant from the plaintiff. Here, the trial court refused to award attorney fees to the defendant. In each case, the defendant was represented by an attorney employed and selected by the defendant's insurance company. I dissented in Scott, and I dissent here.

As in Scott, resolution of this issue requires that we interpret the QSO statute, Ind. Code § 34-50-1-6. "The first step in interpreting any Indiana statute is to determine whether the legislature has spoken clearly and unambiguously on the point in question."

St. Vincent Hosp. & Health Care Center, Inc. v. Steele, 766 N.E.2d 699, 703-704 (Ind. 2002). If a statute is unambiguous, we must give the statute its clear and plain meaning. Bolin v. Wingert, 764 N.E.2d 201, 204 (Ind. 2002). A statute is unambiguous if it is not susceptible to more than one interpretation. Elmer Buchta Trucking, Inc. v. Stanley, 744 N.E.2d 939, 942 (Ind. 2001).

Indiana adheres to the “American Rule” with respect to the payment of attorney fees and requires that parties pay their own attorney fees absent an agreement between the parties, statutory authority, or rule to the contrary. Courter v. Fugitt, 714 N.E.2d 1129, 1132 (Ind. Ct. App. 1999). Thus, the QSO statute is in derogation of the common law rule and, as such, must be strictly construed. Id. The cardinal rule of statutory construction is to ascertain and effect the intent of the drafter. Id. We presume that the legislature did not intend by statute to make any change in the common law beyond what it declares either in express terms or by unmistakable implication. Id.

The QSO statute provides in part:

(a) If:

- (1) a recipient does not accept a qualified settlement offer; and
- (2) the final judgment is less favorable to the recipient than the terms of the qualified settlement offer;

the court shall award attorney’s fees, costs, and expenses to the offeror upon the offeror’s motion.

(b) An award of attorney’s fees, costs, and expenses under this section must consist of attorney’s fees at a rate of not more than one hundred dollars (\$100) per hour and other costs and expenses incurred by the offeror after the date of the qualified settlement offer. However, the award of attorney’s fees, costs, and expenses may not total more than one thousand dollars (\$1,000).

I.C. § 34-50-1-6 (emphasis added). “‘Offeror’, for purposes of IC 34-50, means a party to a civil action who makes a qualified settlement offer (as defined in section 128 of this chapter) to a recipient (as defined in section 129 of this chapter) who is an opposing party in the civil action.” Ind. Code § 34-6-2-90. Black’s Law Dictionary defines “incur” as: “To have liabilities cast upon one by act or operation of law, as distinguished from contract, where the party acts affirmatively. To become liable or subject to, to bring down upon oneself, as to incur debt, danger, displeasure and penalty, and to become through one’s own action liable or subject to.” BLACK’S LAW DICTIONARY 768 (6th ed. 1990).

Here, Gehrig was a party to the civil action, but she did not “incur” attorney fees. Appellant's Appendix p. 45. Rather, her insurance company incurred the attorney fees. The text of the statute on its face does not include a nonparty as an offeror nor provide for the recovery of attorney fees not incurred by the offeror. Notably, the statute does not provide for the recovery of attorney fees incurred “on behalf of an offeror” nor, more to the point perhaps, incurred “by an insurer providing a defense to an offeror.”

The reality of insurance company provided defense and contingent fee prosecution of tort claims was surely known to the legislature and those seeking legislation to attach cost incentive factors to settlement efforts. The language of the statute does not address that reality. We should not distort our language to “rewrite” the statute. “We may not ignore the clear language of a statute and ‘in effect[ ] rewrite a statute in order to render it consistent with our view of sound public policy.’” Myers v. State, 714 N.E.2d 276, 284 (Ind. Ct. App. 1999) (quoting Robinson v. Monroe County, 663 N.E.2d 196, 198 (Ind. Ct.

App. 1996)), trans. denied. Strictly construing the QSO statute, I conclude that the trial court was correct by denying Gehrig's request for attorney fees under the QSO statute. Consequently, I would affirm. See, e.g., Courter, 714 N.E.2d at 1133 (strictly construing the QSO statute and holding that the trial court erred by awarding attorney fees because the children were not parties to the action at the time of the qualified settlement offer).